

Exhibit C

MULTI-DISTRICT LITIGATION

IN RE: GOLD KING MINE RELEASE IN SAN
JUAN COUNTY, COLORADO, ON AUGUST 5,
2015.

NO: 1:18-MD-02824-WJ

TELEPHONIC HEARING AND STATUS CONFERENCE PURSUANT TO
RULE 16(c)(2)(F) and (L)
June 26, 2020
12:00 p.m.
421 Gold, Southwest
Albuquerque, New Mexico

BEFORE: HONORABLE ALAN C. TORGERSON, SPECIAL MASTER

REPORTED BY: Mary Abernathy Seal, RDR, CRR, NM CCR 69
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(3812N) MAS

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1 originally drafted. It asks us purely to interpret
 2 what a regulation is, that it's an OSHA reg that's
 3 applicable to employers for protection of employees.

4 We raised the fact that this doesn't even
 5 nominally try to incorporate facts. The law is very
 6 clear that a request for admission can't just call
 7 for a pure legal conclusion, so what they have done
 8 now is they've inserted the words "applicable to
 9 employers, quote, 'at the Gold King Mine in 2014 and
 10 2015' for protection of their employees from hazards
 11 associated with water accumulation."

12 So we may be able to -- you know, whether
 13 that actually changes anything and actually means
 14 that by nominally incorporating the words "Gold King
 15 Mine" changes it from a pure legal conclusion to one
 16 that asks for facts we're still analyzing and
 17 considering. But we will get our response to them
 18 by July 1.

19 SPECIAL MASTER TORGERSON: All right.
 20 Well, it doesn't sound like you're going to be able
 21 to resolve everything. So rather than pushing this
 22 issue down the road, if you can't resolve all of the
 23 issues with respect to what Mr. Bain has requested
 24 we put on the agenda as items A and B by July 8 or
 25 saying you can't by July 1, in either event, I want

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1 the Government to file their motions by July 15th,
 2 and the Sovereign Plaintiffs can respond according
 3 to the applicable rules.

4 All right. Item C. New Mexico
 5 Environment Department's failure to respond to
 6 requests to admit that New Mexico Environment
 7 Department is the only New Mexico government party
 8 in this litigation and that the State of New Mexico
 9 is not a party on its own behalf despite taking the
 10 position that New Mexico Environment Department is
 11 the only state agency that can be compelled to
 12 respond to discovery requests in this litigation as
 13 a party.

14 Now, I remember we had a discussion about
 15 this some time ago, and apparently that's still an
 16 issue in the Government's viewpoint. So who wants
 17 to address this one, Mr. Bain?

18 MR. BAIN: I'll address it, Your Honor.
 19 So who the party is for New Mexico in this
 20 litigation has consequences both for discovery, as
 21 to who is compelled to respond, but also has
 22 consequences for standing to recover damages. And
 23 you know, as you will recall, New Mexico took the
 24 position in response to our discovery request that
 25 the only party that could be compelled to produce

1 documents in response to our request was the
 2 New Mexico Environment Department, as they brought
 3 their action on behalf of the New Mexico
 4 Environmental Department, and that any other agency
 5 or any other state entity not be compelled through
 6 the litigation to provide documents, but they would
 7 endeavor to reach, you know, memorandums of
 8 understanding or voluntary agreements with these
 9 other entities to get us documents.

10 And so that continues to be their
 11 position. For example, recently we have sought to
 12 get some data on studies that professors at
 13 New Mexico universities have done as part of the
 14 WRRI conference, and so we're trying to get those
 15 voluntarily, because their position is that the
 16 New Mexico Environmental Department is the only
 17 party that can be compelled to respond to our
 18 discovery. Well, we wanted to ask a request for
 19 admission because that has consequences for who can
 20 recover damages or who has standing to recover
 21 damages, and so we asked very simple requests for
 22 admission. For example, "Please admit that this
 23 action is being brought on behalf of the New Mexico
 24 Environmental Department." They denied it.

25 Another request for admission was:

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1 "New Mexico has not brought this action on its own
 2 behalf." They deny that.

3 So they're trying to have it both ways.
 4 They're trying to limit it to the New Mexico
 5 Environmental Department for purposes of responding
 6 to discovery, but for purposes of standing to
 7 recover damages, they're trying to include the
 8 entire state.

9 So this is -- you know, and they responded
 10 to us, "Well, no, you said in the caption,
 11 'New Mexico on behalf of the New Mexico
 12 Environmental Department,'" and find that that meets
 13 both entities. But they sued us in other
 14 litigation, including the District of New Mexico,
 15 and they clearly distinctively identify the State of
 16 New Mexico and the New Mexico Environmental
 17 Department, except for Plaintiffs in that
 18 litigation. So for whatever reason, they are trying
 19 to limit it for purposes of discovery, but they're
 20 not trying to live with the consequences of that for
 21 purposes of standing and other things in this
 22 litigation by responding to our requests for
 23 admissions as they should, given prior
 24 representations they have made to this Court.

25 SPECIAL MASTER TORGERSON: Thank you.

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1 Before I hear a response from the State of
 2 New Mexico, Mr. Bain, when -- I don't recall
 3 specifically, but I'm sure you must have filed a
 4 motion to dismiss. Was this issue addressed in your
 5 motion to dismiss about whether or not New Mexico
 6 Environmental Department was the proper party or had
 7 standing to sue on behalf of the State of
 8 New Mexico?

9 MR. BAIN: We have not done that, but we
 10 are anticipating doing that, and that might be the
 11 relief that we're seeking.

12 SPECIAL MASTER TORGERSON: All right.

13 Mr. Gilmour, do you want to respond on
 14 behalf of the State of New Mexico?

15 MR. GILMOUR: Yes, Your Honor. Can you
 16 hear me?

17 SPECIAL MASTER TORGERSON: Yes.

18 MR. GILMOUR: I need to apologize. I was
 19 having technical difficulties with my phone and had
 20 to drop off and redial in, so I missed the beginning
 21 of Mr. Bain's argument. But based upon our meet and
 22 confers and what I heard at the end, I think I heard
 23 it sufficiently to respond.

24 SPECIAL MASTER TORGERSON: Well, basically
 25 he said that this issue has consequences for

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1 Environment Department, then we can have that
 2 conversation; and again, that's a standing issue.
 3 But when we get to discovery obligations, which is
 4 why we're before Your Honor today, the issue that he
 5 does not like is the duality of the state's
 6 executive branches, meaning that the attorney
 7 general is independently elected from the governor.
 8 And in actions brought by the state attorney
 9 general, other state agencies are not parties to the
 10 action unless they're specifically requested to be
 11 part, which is what happened here. But the attorney
 12 general is the only entity that can bring an action
 13 on behalf of the entire state. You know, the
 14 attorney general is not subject to discipline or
 15 removal by the governor, and it brings the suit
 16 under its own authority.

17 So here, you know, the issue is that the
 18 United States wants the attorney general to be
 19 responsible and somehow be able to compel discovery
 20 obligations from another independently elected part
 21 of the executive authority, namely, the governor.
 22 And the attorney general simply does not have that
 23 ability. What it does have the ability to do, and
 24 what I have explained to the United States, is that
 25 the Environment Department, as a named party, will

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1 discovery and for standing, and they're upset that
 2 you only want to respond on behalf of the New Mexico
 3 Environment Department, and you'll try to get
 4 cooperation from other departments and agencies.
 5 And then he said the standing issue relates to
 6 whether or not the State, through the New Mexico
 7 Environment Department, can recover damages.

8 MR. GILMOUR: Yes, sir. And you have
 9 identified the exact issue, Your Honor, which is
 10 he's conflating discovery obligations with issues of
 11 standing. Standing is not at issue right now. What
 12 we're dealing with is discovery obligations and the
 13 complaint, despite Mr. Bain's recitation, is not
 14 just in the caption; it is identified in paragraph
 15 13 of the party section that the plaintiff, the
 16 State of New Mexico, on behalf of NMED has authority
 17 to bring a lawsuit and is the proper party.

18 Now, what's been difficult with the RFAs
 19 is that they're trying to (unintelligible) by saying
 20 the only -- admit that the only Government agency is
 21 the Environment Department. Well, that's not true.
 22 The State of New Mexico is the plaintiff as well as
 23 the Environment Department.

24 If he wants an admission that identifies
 25 both the State as an entirety, as well as the

1 produce any and all information that is relevant and
 2 subject to the requests that is within its care,
 3 custody, or control because it is a party to this
 4 litigation.

5 We've also agreed to a stipulated order
 6 that Your Honor signed that we would go to a number
 7 of other agencies identified by the United States,
 8 including Taxation and Revenue, the Department of
 9 Tourism, the Department of Agriculture, the
 10 New Mexico Energy, Minerals and Natural Resources,
 11 Department of Abandoned Mine Land Program, and the
 12 Department of Game and Fish. Those were the
 13 entities they wanted us to go to. We have gone to
 14 them, we have collected information, we have
 15 produced information, and we are continuing to do
 16 so. But we can't compel them to do it. We are
 17 doing it by agreement between the attorney general
 18 and the secretaries of those agencies.

19 If the United States wants to compel those
 20 agencies, the United States needs to serve a
 21 subpoena upon those agencies. But what is
 22 frustrating is: Mr. Bain is making an issue where
 23 there isn't one. We are comporting with all of our
 24 discovery obligations. We are producing everything
 25 from the Environment Department as we were required

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1 to do, and we've gone to these agencies and, through
 2 agreement, obtained and are producing and continuing
 3 to produce all the information that the United
 4 States requests.

5 So it's somewhat frustrating that we're
 6 here on a motion to compel when we're doing exactly
 7 what the United States wants. And as Your Honor
 8 stated, if they want to file a motion
 9 (unintelligible) on standing, that's a completely
 10 separate issue, and they're entitled to do that.
 11 But the way they have drafted these RFAs are to
 12 paint us into a corner, and as drafted, they are
 13 simply incorrect, and hence why they have been
 14 denied.

15 SPECIAL MASTER TORGERSON: Okay. So let
 16 me ask a follow-up question, because I'm trying to
 17 determine whether or not your position is
 18 inconsistent. Because you have now said in
 19 paragraph 13 of your most recent complaint that the
 20 State of New Mexico is a party as well as the
 21 New Mexico Environmental Department; and if the
 22 State of New Mexico is a party, wouldn't the State
 23 of New Mexico have to respond on behalf of these
 24 other entities or agencies or departments?

25 MR. GILMOUR: No, Your Honor, not unless

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1 deal with.

2 MR. GILMOUR: Yes, Your Honor, in a
 3 nutshell.

4 SPECIAL MASTER TORGERSON: All right.
 5 Mr. Bain.

6 MR. BAIN: Yes, Your Honor. And, you
 7 know, if what Mr. Gilmour is saying is when the
 8 State of New Mexico sues on its own behalf, it
 9 doesn't have an obligation to turn over relevant
 10 evidence from agencies within the state, I would
 11 like to see that authority because I just can't
 12 believe that's true, having represented the
 13 Government, the United States Government, for a very
 14 long time.

15 And I'll also reference Your Honor to the
 16 litigation in your district which is State of
 17 New Mexico versus United States, caption number
 18 6:19-CV-00178, and it's captioned State of
 19 New Mexico ex rel Hector Balderas, AG, and
 20 New Mexico Environmental Department. Each plaintiff
 21 is set out in a separate paragraph. Here there's
 22 one paragraph: New Mexico on behalf of New Mexico
 23 Environmental Department. Based on that, they have
 24 taken the position in this litigation, Mr. Gilmour
 25 has represented to you previously on October 31,

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1 the information is in the care, custody, or control
 2 of the attorney general.

3 SPECIAL MASTER TORGERSON: Okay. So let
 4 me ask you -- and then I'll give a chance for
 5 Mr. Bain to respond -- you have said, and we've
 6 discussed this before, that you have entered into
 7 this agreement and that the other departments and
 8 agencies have been cooperative, and you have been
 9 providing documents. Has there been an issue raised
 10 about whether or not the documents that you have
 11 provided are sufficient, or other discovery that may
 12 have been requested is not sufficient for some
 13 reason? Or is it just an issue of who to compel?

14 MR. GILMOUR: Your Honor, the only issue
 15 that I'm aware of -- and I defer to my colleagues,
 16 Ms. Rowenko and Mr. Homer, as they have been closer
 17 to it than I have. The only issue that I am aware
 18 of is related to the abandoned mine land program,
 19 which is being continued to meet and confer and
 20 discuss regarding.

21 SPECIAL MASTER TORGERSON: Okay. Well, so
 22 your position is: You have responded to the request
 23 for admission, and it is what it is; and if Mr. Bain
 24 wants to pursue this issue of standing, that's a
 25 separate issue from the discovery issues that I'm to

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1 2019, and November 13, 2019, that the case is being
 2 brought on behalf of the New Mexico Environmental
 3 Department. You asked him in November why did the
 4 State of New Mexico rather than the State of --
 5 New Mexico Environmental Department sue, and Gilmour
 6 responded, "The agency is the one identified by the
 7 State to be in charge of mediation, restoration, and
 8 any and all damages that flow from that."

9 So we will file a motion to dismiss based
 10 on standing. But if it comes out that the State of
 11 New Mexico somehow is a party, they have been
 12 operating under, my opinion, a false basis for
 13 responding to requests for discovery, that only this
 14 one agency can be compelled to produce documents to
 15 us, and that all other information from the State
 16 has to be produced through some type of memorandum
 17 of understanding or agreement. And as I mentioned
 18 before, we're trying to get information now from
 19 University professors that -- you know, we're trying
 20 to work it out with them, but it's not something
 21 that they're willing or think that they have an
 22 obligation to produce because New Mexico is a party
 23 in this case.

24 SPECIAL MASTER TORGERSON: All right.
 25 Well, I'm not familiar with --

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1 UNITED STATES OF AMERICA

2 STATE OF NEW MEXICO

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4 REPORTER'S CERTIFICATE

5 I, Mary Abernathy Seal, RDR, CRR, CCR, do
6 hereby certify that the foregoing pages constitute a
7 true transcript of proceedings had before the said
8 Court held in the City of Albuquerque, New Mexico,
9 in the matter therein stated.

10 In testimony whereof, I have hereunto set my
11 hand on this 27th day of June, 2020.

12

13

Mary A. Seal

14

Mary Abernathy Seal, RDR, CRR, CCR
BEAN & ASSOCIATES, INC.
NM Certified Court Reporter #69
License expires: 12/31/20

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Date taken: June 26, 2020

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